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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN MICHAEL BURTON,

Defendant and Appellant.

G040736

(Super. Ct. No. FWV036286)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Gerard S. Brown, Judge. Reversed.

Rebecca P. Jones, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and
Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

John Michael Burton appeals from a judgment after a jury convicted him of assault on Tiffany E., a child under eight years of age causing death. He argues the following: (1) the trial court erroneously admitted evidence of three jail house telephone calls with his aunt and mother; (2) the prosecutor committed misconduct when the prosecutor cross-examined him, and alternatively, his defense counsel was ineffective for failing to object to any of the alleged instances of prosecutorial misconduct; (3) the court erroneously instructed the jury with CALCRIM No. 361, “Failure to Explain or Deny Adverse Testimony”; (4) his trial counsel was ineffective because he failed to object to admission of a juvenile court order prohibiting him from living with Tiffany E.; (5) there was cumulative error; (6) the court erroneously refused to disclose juror identifying information to investigate possible juror misconduct; and (7) the court erroneously denied him good conduct credits.

We agree the trial court erroneously admitted the three jail house telephone conversations and admission of those conversations requires reversal. We also conclude the cumulative prejudicial effect of the admission of the telephone conversations and other errors, which we will discuss anon, would require reversal.¹

FACTS

Tiffany E. was born on August 24, 2005, three weeks premature, in Los Angeles County with methamphetamine and amphetamine in her system. Approximately five days later, Penny Lane Family Services placed Tiffany E. with foster parent Acela Villarreal, who had a three-year-old girl, a nine-year-old boy, and a 15-year-old boy living with her. Social worker Georgina Brown was assigned the case in September 2005. The case file indicated another social worker had visited the home sometime that

¹ Because we reverse, we need not address Burton’s meritorious claim the trial court erred in not awarding him good conduct credits.

month and noted Tiffany E. was vomiting frequently.² On October 10, 2005, Brown learned a juvenile court ordered Tiffany E. released to her 19-year-old adult half sister, Melissa Eilders (Missy)—they had the same father but different mothers. The case file also indicated the court ordered Tiffany E. to not reside in the same residence as Missy's boyfriend, Burton.

Because Burton did not want Missy to move away with Tiffany E., they moved in with Burton, his three-year-old son, M.B., his mother, Lisa Cardona (Lisa), and his stepfather, Manuel Cardona (Manuel), in Montclair. Lisa and Manuel slept in the master bedroom, Burton, Missy, and Tiffany E. slept in the second bedroom, and M.B. slept in the third bedroom. Manuel worked, Lisa volunteered every morning at a nearby school, and Missy worked during the day and went to school at night. Burton neither worked nor went to school. When Missy left the house at 7:00 a.m., for work, Lisa would care for Tiffany E. and M.B. Lisa would take them when she volunteered at the school on the days she did not drop off M.B. at preschool.

On October 12, 2005, Brown visited Missy and Tiffany E. at the Cardona's residence. Brown observed Missy interacting appropriately with Tiffany E. and providing her basic care needs. Tiffany E. was vomiting less since Missy began to care for her. In Missy's bedroom, Brown saw a bassinet and male clothing in the closet. Missy stated Burton had moved out but had not yet retrieved all his belongings.

On October 24, 2005, Brown called Burton. Burton said he moved to 4340 Goldenrod in Chino. Missy later faxed Brown a postmarked envelope addressed to Burton at that residence and a letter from the landlord stating Burton rented a room there.

On October 28, 2005, Tiffany E. visited her pediatrician for her two-month checkup. The pediatrician noted that aside from a cough, Tiffany E. appeared to be

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There was evidence this was because she was going through withdrawals.

healthy and normal. Sometime in mid-November, Burton cared for Tiffany E. by himself while Lisa and Missy were unavailable.

On Friday, November 25, 2005, Burton, Missy, M.B., and Tiffany E. went to Lake Isabella and returned home on Monday. The same day, Brown again visited Missy and Tiffany E. at the Cardonas' residence. Tiffany E. was happy, interactive, and responsive. She wore a sleeveless onesie and had no marks or bruises of any kind. During the visit, Burton walked downstairs and Missy introduced him to Brown. He asked Missy a question and returned upstairs. Regarding the juvenile court order prohibiting Burton living with Tiffany E., Brown did not think it unusual Burton was there because his son lived there, but she intended to make further unannounced visits.

Early on the morning of November 30, 2005, Missy called Lisa into their room to see 14-week-old Tiffany E.'s first smile; Burton was asleep. Missy left for work at approximately 7:00 a.m., and Lisa put Tiffany E. in a swing and fed M.B. Because Lisa did not want to take Tiffany E. outside in the cold weather, Lisa asked Burton to watch Tiffany E. while she volunteered and dropped off M.B. at preschool. He agreed, and Lisa put her on his bed while he watched television. Approximately one hour later, Manuel left.

The only explanation as to what happened next is Burton's testimony. We will provide that evidence now, and then present the substantial medical evidence that the parties offered at trial anon.

After Burton agreed to watch Tiffany E., he changed her diaper and she fell asleep. When she awoke, Burton started to feed her when he needed to use the restroom. He propped her up on a pillow with her bottle and went to the restroom. When he returned a couple minutes later, the bottle was out of her mouth and she was making "gurgly" noises like she was having difficulty breathing. Burton picked her up, put her over his shoulder, and burped her; she vomited on his shirt. She continued to have trouble breathing so he shook her, but she let out a "little cry" and went "limp." Burton

tried mouth-to-mouth resuscitation, but she vomited on him again. Burton yelled for Manuel, but he was not home, and Burton called 911. He ran outside with Tiffany E. because the fire station was nearby. A neighbor who heard the commotion took Tiffany E. and “started giving [her] back blows.” Burton took her back and gave her to paramedics when they arrived. Paramedics performed CPR on Tiffany E. and intubated her and used a defibrillator to restart her heart.

Burton ran home, called Missy and told her what happened, and put his shoes on. Missy drove home, picked up Burton, and drove to the hospital. He told her Tiffany E. choked on her bottle and went limp. At the hospital, Burton told Missy it was his fault. She responded it could have happened to anyone.

Burton went home to change because he had vomit on his shirt, and he returned to the hospital. When Tiffany E. was transferred to Loma Linda University Hospital, Burton and others drove there.

Dr. Cynthia Tinsley, a pediatric intensive care physician, treated Tiffany E. at Loma Linda University Hospital. Tiffany E. had bruises across her chest, around her lower abdomen and groin area, and above her left eyelid. An X-ray revealed she had a fractured skull and multiple fractured ribs. A CT scan revealed her brain was swelling. Tinsley diagnosed her injuries as “non-accidental trauma.” She believed Tiffany E. was shaken violently and suffered a significant impact injury.

The next day, November 1, 2005, law enforcement officers arrested Burton at his home. Tiffany E. died the next day. Burton spoke with his aunt, Laura Hornstra, and mother from jail on the telephone over the next few months. An information charged Burton with assault on a child under eight years of age causing death (Pen. Code, § 273ab).

Prosecution Evidence

The prosecutor offered Lisa's testimony. Lisa explained that during October and November 2005, Burton did not live at 4340 Goldenrod Court in Chino.³ She explained that on the morning of the incident she saw Tiffany E. smile and she seemed normal. Lisa testified she spoke with Burton on the telephone while he was in jail. On cross-examination, Lisa testified she never saw Tiffany E. with any bruises or abnormalities of any kind.

Lisa's sister, Hornstra, also testified for the prosecution. Hornstra testified that when she left the hospital and went to Lisa's house, she retrieved clothing she later washed. Hornstra claimed she did not know she washed the clothing Burton wore the morning of the incident until police arrived to search Lisa's car. She knew Burton to be truthful and of good character. Hornstra testified she spoke with Burton a few days after he was arrested, and then again, before Christmas.

The prosecutor also offered Missy's testimony. Missy testified Burton was supportive of her caring for Tiffany E. She was aware of the juvenile court order prohibiting Burton from living with Tiffany E., but Brown told her it was okay. Missy testified that on the morning of the incident, she did not notice any bruises on Tiffany E. Missy explained that when she picked up Burton, he told her what had happened. On cross-examination, Missy stated police officers interviewed her and she told them about M.B. kneeling Tiffany E. on the head, and how when Missy put her in a swing she struck the top of her head. She also told officers about the small pebble sized bruises. Missy never saw Burton act violent or aggressive towards anyone. She did not think he was the kind of person who could have inflicted Tiffany E.'s injuries.

Dr. Frank Sheridan, a board certified forensic pathologist who performed the autopsy on Tiffany E., testified for the prosecution. Sheridan testified she had bruises

³ Burton and Danielle Gragson are the parents of M.B. Gragson's mother, Kim Gragson, lived at 4340 Goldenrod Court in Chino.

on her right eye, nose, and tongue. He explained she had a bruise on the left side of the back of her head, which was associated with her skull fracture, and her brain was swollen. He said Tiffany E. had substantial brain bleeding, which was less than two days old, and bleeding on the back of her eye and spinal cord. He opined these injuries were consistent with shaken baby syndrome. He believed Tiffany E. was “accelerated and slammed onto something.” He agreed such injuries could happen accidentally, but there was nothing to suggest Tiffany E. was in a car accident or fell from a considerable height. He explained Tiffany E. would not have been “normal” from the moment she suffered her injuries—she would have been unconscious or semicomatose. She could not have suffered her injuries the day before because she would have been dead within minutes to hours. He stated she had multiple rib fractures that were between two and six weeks old and “fresh” rib hemorrhages. He said she had a “fresh” abdomen bruise, possibly caused by being hit with a fist. He opined Tiffany E.’s injuries were the result of nonaccidental abusive head trauma that occurred on November 30, 2005. He said seizures could not have caused her injuries.

Sheridan’s ex-wife, Dr. Clare Sheridan-Matney, a forensic pediatrician, also testified for the prosecution. She first examined Tiffany E. at Loma Linda University Hospital on the day of the incident and reviewed her medical records, X-rays, and CT scan. She was comatose and almost brain dead. She had a severe brain injury, and had bruises on her tongue, eye, chest, groin, knee, and back. She had a skull fracture and approximately 19 rib fractures ranging from two to five weeks old. Based on all the medical evidence and the family’s explanation of what happened, Sheridan-Matney believed Tiffany E. was a battered child. But she could not say for certain whether it was impact or shaking that caused the head trauma, but the skull fracture could not have been caused by shaking alone. Sheridan-Matney opined she could have suffered those injuries prior to November 30, but she would not have been normal. She believed Tiffany E.’s

injuries were the result of nonaccidental trauma caused by a person. She did not believe Tiffany E.'s injuries were the result of life-saving measures.

Tinsley testified that based on the severity of Tiffany E.'s injuries, she could not have smiled that morning and she would have shown symptoms of her injuries. She did not think her injuries could have happened two days earlier.

The paramedic, Jerod Blomberg testified for the prosecution. On cross-examination, he testified he could not recall seeing any bruising, or any contusion or swelling on Tiffany E.'s head.

Defense Evidence

Burton testified on his own behalf. In addition to his version of the events discussed above, he also testified to the following. He described himself as “[l]aid back, calm, kind of a pushover[.]” Burton claimed he had been around children his entire life and cared for infants, including Tiffany E. He stated he also cared for M.B. when he was an infant. He said he was never violent, aggressive, or angry with children he came in contact with, including Tiffany E. Burton stated he was not jealous of Tiffany E. and as time passed, he grew more attached to her, and his love for her grew stronger. Burton explained that when it was decided Missy and Tiffany E. would move into the Cardona's residence, “[He] was ecstatic. [He] love[d] children and we ha[d] [M.B.] and . . . we'd have a daughter. We'd have Tiffany [E.] as [their] daughter.” He said that despite the juvenile court order, he lived with Tiffany E. at his mother's house because he had no other place to live.

Burton stated that other than the small bruises Tiffany E. had because of an allergic reaction, she had no other visible bruises. He said sometimes she was rigid holding her hands out and displaying all 10 fingers. He explained that when they were in Lake Isabella, Burton, Missy, M.B., and Tiffany E. were in the same bed when M.B. crawled across Tiffany E. and hit her on the head with his knee. Burton said he never punched, kicked, choked, or suffocated Tiffany E. He added that on the morning in

question he never injured her out of anger or frustration—he was trying to save her life. With regard to his comment to Missy at the hospital that Tiffany E.’s death was his fault, he meant that he felt responsible for her death because she was in his care. Burton stated he loved her like she was his daughter, grieved for her, and he was not guilty of murder.

With regard to his telephone calls with Hornstra and his mother, Burton said he was scared and did not want to discuss the facts of his case because he was afraid of what would happen if inmates learned of the alleged offense. Burton stated he was advised to only discuss the case with his attorney. When his counsel asked him why he considered pleading guilty, Burton said he wanted the case to be resolved so he could properly grieve for Tiffany E. Burton said he did not feel he had to explain everything to Hornstra and his mother because he had already told them what had happened.

On cross-examination, Burton admitted he knew he was not supposed to be living with Tiffany E. and he had a difficult time living on his own. Burton claimed he worked part time at the time of Tiffany E.’s death. When the prosecutor asked him whether Tiffany E. was the only thing preventing him from living at home and with his loved ones, he replied, “No.” When the prosecutor asked him whether it was true Tiffany E. had no bruises when Missy and Lisa left the house the morning of the incident, he said, “Yes.” The prosecutor asked him whether it was true he had no explanation as to how Tiffany E. suffered her injuries, Burton responded, “I have no idea how that happened.” When the prosecutor asked whether he had any explanation, Burton replied, “The marks did not come from me.” He denied ever telling his mother to wash his clothes.

Burton offered the testimony of Dr. Ronald Gabriel, a board certified pediatric neurologist and pediatric neuroimager who was an expert in determining whether a child’s injuries are accidental or nonaccidental. Gabriel testified he reviewed all Tiffany E.’s birth and medical records and the CT scan taken the day she was admitted to the hospital. He stated there was critical missing medical evidence he needed to help

date Tiffany E.'s head injuries: photographs of retinal hemorrhages and bone fragments or microscopic analysis of bone fragments. Gabriel said Tiffany E. had blunt force trauma to her head and would not be in the category of shaken baby syndrome. He opined that with a single skull fracture it is difficult to tell whether a child's injuries were accidental or non accidental—he would need to look at other medical evidence, and legal, cultural, and social factors. Based solely on the CT scan, he opined Tiffany E.'s skull fracture was hours to days old but without the missing medical evidence he could not specify further. He explained there could be a delay between a brain injury and the time symptoms are observed. He stated Tiffany E. had “abnormal” blood clotting, “which means the bleeding was going on for a long period of time,” and her head trauma could have occurred days before. Based on the CT scan, he believed her brain was at the point of death for a long time because it herniated through the opening at the base of the brain “[a]nd that takes a long time to happen.” He opined she was essentially dead when the 911 call was made. He said Tiffany E.'s injury could have been caused by being kned in the head and because there were no outward signs she had a skull fracture, it could have been hours or days before anyone noticed she was injured. Finally, he testified her crying, irritability, and vomiting were caused by her withdrawal from amphetamines.

On cross-examination, Gabriel testified it was not relevant to his analysis that on the morning Tiffany E. died she was smiling because smiling for a child her age is reflexive not social. He did not believe there was sufficient evidence in the medical record to justify a diagnosis of child abuse. He conceded it was possible for a child to die within minutes of having her head slammed down on a hard object.

Burton also offered the testimony of Dr. James D. Collins, a board certified radiologist. He testified it takes 90 days for a fracture to heal, and 60 days for a bony callous to bridge the gap of a fracture. Collins reviewed Tiffany E.'s X-rays and opined she had multiple rib fractures that were between 30 and 60 days old.

Burton also offered numerous character witnesses who all testified generally to his peaceful nature and truthfulness. Many of these witnesses testified they had observed Burton with M.B. and never saw Burton act violently or angrily towards him. Many of the witnesses testified they did not believe Burton was capable of injuring a child. Two of the witnesses testified Burton babysat their children.

The jury convicted Burton of assault on a child causing death. After the trial court denied Burton's new trial motion, the court sentenced Burton to prison for 25 years to life.

DISCUSSION

I. Adoptive Admissions

Burton argues the trial court erroneously admitted recordings of jailhouse telephone conversations with Hornstra and Lisa because they were irrelevant and prejudicial, and they were not admissible pursuant to the adoptive admission exception to the hearsay rule. We agree they were irrelevant and inadmissible as adoptive admissions, and their admission requires reversal of the judgment.

A. Evidence Code section 1221

Evidence Code section 1221 permits the introduction of a statement as an adoptive admission "if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Thus, "[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." [Citations.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

B. Telephone Calls

Here, the prosecutor moved to admit recordings of three jail telephone conversations Burton had with his aunt and mother, and defense counsel objected. After an apparently lengthy in-chambers discussion off the record concerning admissibility of the recordings, the parties discussed the matter in open court on the record. Defense counsel contended the jail telephone conversations were not authenticated, irrelevant and not admissible pursuant to the adoptive admission exception to the hearsay rule. The trial court ruled the statements were admissible as adoptive admissions because they were the types of statements a person would normally respond to by expressing shock or claiming innocence. The court explained the statements' relevance was not substantially outweighed by the undue consumption of time, prejudice, or confusion of the issues. The trial court admitted the three telephone calls in their entirety. We now provide significant portions of Burton's telephone conversation with his aunt and mother.

1. Hornstra-December 3, 2005

Before the conversation begins, a voice tells the listeners the call is being recorded and monitored. Burton's conversation with Hornstra began by Burton explaining to her that he had already been moved out of one housing unit because another inmate had found out what charges Burton faced. He told Hornstra a deputy told him he was "gonna [*sic*] get [his] fuckin' ass whooped." Burton and Hornstra then engaged in a discussion about the temporary custody arrangements for Burton's other child.

Hornstra assured Burton that she and other family members would find out when his arraignment would take place and they would be in court. Hornstra told Burton she had been reading all the press coverage of the case. She stated: "And [Burton], you have to tell the truth. Not to anybody but your attorney. But you have to make a plea otherwise it's 25 years to life mandatory." Burton responded, "What?"

After Hornstra read Burton an article from a local newspaper stating Burton "violently shook" Tiffany E. and that he was suspected of child abuse and child neglect

and had been booked into West Valley Detention Center, Burton replied, “Damn.” Hornstra told Burton this was a very serious case and added, “[Y]our mom’s attorney said that most cases are plead anyway. But that is your best bet.” Burton stated, “I know,” and “Okay.”

Hornstra explained to Burton that she spoke with Missy’s mother “[a]nd asked her if Missy grasped the fact that this was done at your hands and she said she had absolutely no thinking process like that because you know, she’s still grieving over that poor baby. Missy is just inconsolable.” Burton answered, “Yeah.”

Hornstra then advised Burton on what to do. She said, “You have to do it for yourself and for your family. Because if you go to a jury trial, th[e]n it’s, I’m telling you I’m sending you all the articles I can find on the ramifications and the final verdict. And, I mean, you’re hung. But if you plead out it’s gonna [sic] be much less time.” Burton responded, “Okay.”

Hornstra told Burton everyone was in shock. She told him nobody hated him and that everyone loved him. She then assured him everyone would stand behind him, but he needed to do the right thing.

Hornstra implored Burton to not speak with anyone. He responded, “Uh-huh.” She stated, “Don’t talk to anybody until you talk to your attorney.” He answered, “Okay.”

Throughout the conversation family matters were discussed. At this point there was a discussion as to how a phone call might be arranged between Burton and Missy. A little later, Hornstra returned to her theme of telling the truth. “And, I mean not a version of the truth; not what you wished happened because believe me, we would prefer that. But it has to be the truth [Burton].” After Burton responded, “Okay[,]” Hornstra added, “And that’s gonna [sic] be a condition from the . . . [district attorney] to make a plea with you. You’re gonna [sic] have to tell exactly what happened.” Burton

again responded, “Okay.” Hornstra told Burton to think about “it,” but said, “Don’t write anything down.”

Next, Hornstra spoke about what she believed would happen in court. She advised Burton he likely would not have an attorney when he first appeared and the judge would not let him plead guilty without a lawyer. She told Burton he should plead not guilty and the court would appoint a lawyer to represent him and “the process” would begin.

The conversation then returned to the dangers Burton could face from other inmates. Burton said he had been told if inmates asked about his charges he should just tell them he was in jail for grand theft or some other crime. When Hornstra asked who had gotten Burton’s paperwork, Burton said he did not know but surmised someone might have looked at his paperwork “when [he] was in the shower, taking a shit, or some - - - I don’t know.”

As the call ended, Hornstra told Burton his family would not abandon him, but he should think about everything. She concluded by telling him she loved him.

2. Hornstra-December 2005

Burton called Hornstra again from jail a few weeks later. After the voice recording played, this conversation initially covered a variety of subjects including the status of a wound on Burton’s leg, how Burton’s mother had cried while visiting him, the circumstances of a funeral, and the fact Hornstra had missed a previous call from Burton while she was out. Hornstra told Burton his mother was concerned that Missy’s mother would not let her visit Burton in jail. Burton said he had spoken with Missy and Missy told him she thought it might look bad if she visited him in jail. He then recounted to Hornstra, “I was like look bad? You’re my fucking girlfriend.”

The conversation then turned to a concern Missy’s mother had that people would not know Tiffany E. was well cared for. And Burton explained to Hornstra how he and Missy had been at her grandmother’s home just a week before, and Tiffany E.

showed no signs of injuries. Burton's explanation was laced with profanity. Next, Burton asked Hornstra whether she had sent the information she had told him about regarding shaken baby syndrome. Hornstra indicated she had not sent it initially because she was fearful that someone would get into the mail and find out the nature of Burton's charges but had ultimately sent it. Burton went on to explain the mail process in the jail. He said all inmate mail was read before it was delivered and the stamps were removed to prevent someone from smuggling in drugs by placing it under the stamp.

Christmas shopping and Christmas gifts were the next topic of conversation. Hornstra complained she had to write a check for \$950 to an apparent family member because the family member had to buy an "Xbox" for her boss. Hornstra then spoke about the excessive number of gifts "Carrie" was going to be receiving, but she explained Carrie did not have grandparents or two parents that buy her things. Returning to the "Xbox" Hornstra said, "The guy is black and she had to buy one for him." He said, "Damn." She said the family member was stupid for making the gift and said if it had been her she would have said, "fuck you." Burton replied, "(Inaudible) eat my dick."

More conversation about matters unrelated to the criminal proceedings occurred. There was a discussion about the circumstances of a person's death and the fact the decedent had failed to provide for his wife. Hornstra then talked about how she would handle the funeral arrangements for "Pop" when the time came. Hornstra said she did not have family phone numbers and commented, "Fuck it[,] they could just do a service on their own. Plus I'm cremating him which Catholics don't believe in." Burton responded, "Yeah, he'll be sitting there on the fuckin' stool, on the mantle."

Regarding the criminal charges, Hornstra told Burton to not lose hope because they would never stop fighting for him. Burton said his mother told him she does not want the case to go to trial because they will plaster pictures of Tiffany E. all over the courtroom. When Hornstra said, "Right," Burton replied, "someone's gonna

[sic] go and need to be punished for it, so she says like if they take; make a deal or whatever, it's like I'll take any deal in county jail. I don't care, whatever, but I don't want to go no [sic] prison for it." Burton continued, "Like I don't care if they have to give me a strike or whatever the fuck. Hornstra said she honestly thought the prosecution "doesn't have anything." But she complained the prosecution was "trying to make [his] mom out to be like the McMartin family." Burton responded with a reference to the "bitch detective."

As the conversation was coming to a close, Hornstra commented she had just received an e-mail from Missy about e-mails Missy had been receiving from M.B.'s mother, Gragson. Burton and Hornstra both made disparaging comments about Gragson. They agreed the best way for Missy to handle Gragson was to ignore her and avoid contact. Hornstra then read Gragson's e-mail to Burton. In the e-mail Gragson threatened Missy and pointed out Missy could not speak with Burton because he was in jail for killing Missy's sister. Hornstra ended the call telling Burton she loved him. Burton responded he loved her too, and asked Hornstra to call Missy and tell her, "Don't listen to that shit."

3. Lisa-Unknown Time

Burton called his mother, Lisa, from jail at an unknown time. After the voice recording played, Burton and his mother discussed her recent trip and the fact the trip helped M.B. to not think about Burton's absence. When Burton asked his mother what was going on with Missy's mother, Lisa explained she was being negative towards Missy. She also discussed an e-mail Gragson sent Missy and said Gragson was "diggin' her own grave." She called her a "scumbag." Lisa said they loved Burton and Tiffany E. and did not care what Gragson thought. Burton and Lisa then discussed how Missy and her mother, and Gragson and her mother, were trying to explain to M.B. what happened to Tiffany E.

Burton then spoke to M.B. When that conversation ended, Lisa told Burton she was going to meet with the public defender investigator. When Burton asked whether she was meeting with the prosecutor, Lisa responded, “No, . . . I’m not going. ‘Cause the detective there, she’s a bitch.” Burton asked Lisa whether Missy knew the prosecution “are the bad guys.” Lisa replied Missy did, but her mother thought Burton has nothing to hide. She told Burton to not talk with them. She resumed talking about her plans to meet with the public defender investigator but avoid the detective because she was a bitch. When Burton again said he warned Missy about the prosecutor, Lisa responded, “they don’t care about the truth, they just want a conviction.” They continued discussing Lisa’s meeting with the public defender investigator, and Missy’s meeting with the prosecutor. Their discussion then turned to how the family was dealing with Burton’s incarceration. In a profanity laced statement, Burton told Lisa about his injured leg. They then discussed who was going to visit Burton and whether he had enough reading material. Lisa then said Missy’s mother found information concerning the condition where a baby is stiff and keeps her hands open. Burton commented how Tiffany E. “wouldn’t fuckin move[,]” and she cried constantly. They then discussed all the people that had been in contact with Tiffany E. the preceding weeks.

Lisa explained law enforcement was taking their time with the case because it was high profile. She added, “They cannot, but, if they make a deal like that’s just like a little bit of time, you’re gonna [sic] have to take it.” Burton answered, “Oh, I know.” When Lisa said the case could not go to trial because the jury would see Tiffany E.’s picture and “think someone has to pay for her being gone[,]” Burton replied it was going to be him. Burton added, “That’s why I said, like if, if a deal comes up with any county time, which I don’t want to go to prison.” When Lisa agreed, he said, “any county time, even I’ll take a strike, I don’t care.”

When Burton stated he did not want to go to state prison, Lisa stated, “No and you can’t, no, and you can’t have anything with a child itself. I mean they’re gonna

[sic] take a while to make a deal because it's so high profile, they have to think, you know?" He said, "Yeah, that (inaudible) didn't suffer." Lisa repeated the case could not go to trial because the jury would hold Burton responsible. Lisa then said her sister would pay for Tiffany E. to be exhumed for further tests. They then both maligned Gragson further.

C. Analysis

1. Adoptive Admissions

Burton argues his statements to Hornstra and Lisa were inadmissible because his responses were not adoptive admissions for the following reasons: (1) his aunt and mother did not accuse him of anything he would be expected to deny; (2) the record supports the conclusion he was invoking his Fifth Amendment right to remain silent; and (3) the majority of the conversations did not concern the case. We agree with Burton the conversations were clearly inadmissible because they were not relevant and they were not adoptive admissions.

As we explain above, pursuant to Evidence Code section 1221, an accusatory statement followed by a defendant's silence or equivocation is admissible. Because the trial court admitted the conversations in their entirety, it is impossible to determine which statements the trial judge believed were admissible pursuant to the adoptive admission exception. The court merely stated it "believe[d] that these follow the standards of adopted admissions[]" because "[t]he statements made to [Burton] were the kinds of statements that a person would normally respond to in a significantly different manner by indicating innocence, shock at things that might have been said, and so forth." Clearly, the entire conversations were not admissible pursuant to Evidence Code section 1221 because as we discuss anon, the majority of the conversations had nothing to do with the case, and the circumstances were such that Burton would not be expected to reply to any statement that did concern the case.

In the future, to assist the reviewing court in evaluating an appellant's arguments, we caution the trial judge to clearly identify which statements are admissible under the adoptive admission exception or any other hearsay exception. As we explain anon, this error so infected the trial that it undermines our faith in the verdict and requires us to reverse Burton's conviction.

With respect to the merits of Burton's claim, nearly all of the conversations were inadmissible because the conversations were irrelevant to the charged offense. For example, during Burton's first conversation with his aunt, they discussed where he was housed, custody arrangements, press coverage, family support and telephone calls, trial court proceedings generally, and the possibility Burton would be assaulted in jail. And some of the alleged adoptive admissions were not admissions at all. When Hornstra told him to tell the truth, to not speak with anyone but his attorney, and to make a plea, Burton asked, "What?" After she read him a lengthy newspaper article concerning the case, he replied, "Damn." When she told Burton that Missy's mother asked Missy if she understood Tiffany E. died "at [his] hands," and Missy was "inconsolable," Burton responded, "Yeah." The last statement made to Burton before he said yes was that Missy was inconsolable. None of these responses could be construed as admissions.

During a second telephone conversation with Hornstra, they discussed his leg wound, his mother's recent visit, a funeral, family telephone calls, visitation, mail, Christmas gifts, the death of another person, and e-mails from Gragson to Missy. None of these discussions, which were the vast majority of the conversation, were adoptive admissions. The one portion of this conversation that does concern the case does not include an accusatory statement by Hornstra and silence or an equivocal response by Burton.

During Burton's conversation with his mother, they discussed her recent vacation, the e-mails, how they explained to M.B. what happened to Tiffany E., the fact Lisa was going to meet with the public defender investigator, Burton's desire to have

Missy not speak with the prosecutor, how the family was dealing with his incarceration, his leg injury, visitation, and reading material. Burton also spoke with M.B. None of these discussions had anything to do with the case and were not adoptive admissions. We are perplexed as to how the trial judge could admit them in their entirety.

Which statements, if any, then were adoptive admissions?

The Attorney General in its brief and at oral argument focuses on just one statement out of 50 pages of telephone conversation transcripts—Hornstra’s statement to Burton that she spoke with Missy’s mother and when Hornstra asked her whether Missy understood “this was done at [his] hands,” Missy’s mother said Missy “had absolutely no thinking process like that because . . . she’s still grieving over that poor baby. Missy is just inconsolable.” Burton answered, “Yeah.”

First, what statement was Burton adopting? Was he adopting as true the statement “this was done at [his] hands,” the statement “she has absolutely no thinking process like that because . . . she’s still grieving over that poor baby[,]” or the statement “Missy is just inconsolable.” The only statement that even remotely accuses him of anything was the first statement, but that was not an accusation he killed her. Instead, it was a statement that she was in his care when she died.

But even if it was an accusation, were the circumstances such that he would be expected to reply? No, they were not. Before the conversations began, a voice recording informed Burton the calls were being monitored and recorded. Then one of Burton’s first statements to his aunt was that someone saw his paperwork and learned what he was being charged with, and a deputy told him he was going to be assaulted. Additionally, before the exchange the Attorney General claims was an adoptive admission, Hornstra told Burton to tell the truth, but “not to anybody but [his] attorney.” Based on the fact his conversation was being listened to, his concern for his personal safety, and his aunt’s plea to only speak with his attorney, we conclude that even if the above-claimed statement was an accusation, the circumstances were not such that Burton

would be expected to reply. We conclude the trial court erroneously admitted the three telephone conversations because nearly all of the conversations were irrelevant and those statements that did concern the case were not adoptive admissions.

2. *Prejudice*

As a general matter, the application of the ordinary rules of evidence does not impermissibly infringe on a defendant's constitutional rights, and therefore, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Here, based on our review of the entire record, we conclude it is reasonably probable that had the trial court excluded the telephone conversations, Burton would have received a better result. (*In re Neely* (1993) 6 Cal.4th 901, 909 [a reasonable probability is one sufficient to undermine confidence in the outcome].)

The evidence at trial demonstrated that Tiffany E. was released to Missy when she was approximately six weeks old. Between the time Missy began to care for her and the morning of the incident, there was evidence Burton cared for Tiffany E. only one time other than the morning of the incident.

There was evidence that Tiffany E. was "normal" on the morning of the incident when first Missy, and then Lisa, left the house. Both Missy and Lisa testified Tiffany E. smiled for the first time, and she did not have any bruising or marks on her body. As there was no one else present, Burton's testimony was the only evidence concerning the events that transpired during those couple hours. Burton testified he did not harm Tiffany E., and in fact attempted to save her life when he returned to the bedroom and saw that she was struggling to breathe. Numerous character witnesses testified Burton was trustworthy and peaceful, and a couple stated they trusted him with their own children.

The medical evidence was also disputed. Sheridan testified Tiffany E.'s injuries were the result of non accidental abusive head trauma that occurred on November

30, 2005, and she had brain bleeding that was less than two days old. Although Sheridan admitted Tiffany E.'s injuries could have happened accidentally, he believed she was accelerated and slammed into something. He explained she would have been unconscious or semicomatose from the time of her injuries and not have been "normal" from the moment she suffered her injuries. She could not have suffered her injuries the day before because she would have been dead within minutes to hours. He stated she had multiple rib fractures that were between two and six weeks old.

Sheridan-Matney agreed with Sheridan that Tiffany E.'s injuries were the result of nonaccidental trauma caused by a person. She also testified that it would have taken more than shaking to cause her injuries. She testified that had Tiffany E. suffered her injuries before November 30, she would not have been normal that morning. She had approximately 19 rib fractures ranging from two to five weeks old. Tinsley's testimony was also consistent with their conclusion on the timing of the head trauma.

Burton's expert, Gabriel, however, painted a different picture. He agreed with the prosecution's experts that Tiffany E. suffered blunt force trauma to the head that was hours to days old. But he testified that it was medically impossible to date the injuries because there was critical medical evidence missing. He explained there could be a delay between a brain injury and the time symptoms are observed, and her head trauma could have occurred days before. Gabriel opined Tiffany E.'s injury could have been caused by being kneed in the head days earlier. He did not think it important she smiled that morning because at her age smiling is reflexive, and not social. Collins testified Tiffany E. had multiple rib fractures that were between one and two months old.

When considered together, the evidence demonstrated Tiffany E. was a battered child who suffered from rib fractures either before and/or after she began living with Missy, Lisa, Manuel, M.B. and Burton. The record also established she suffered a massive head trauma either within hours or possibly days of being left in Burton's care. The Attorney General conceded at oral argument that had the jury believed Gabriel's

testimony, that testimony would have been sufficient to create a reasonable doubt. Based on our review of the entire record, we conclude that the evidence of guilt was inconclusive.

With respect to the effect of the telephone conversations, Burton's conversation with his aunt and mother are laced with profanities by all three parties. Burton at one point mentions, "taking a shit," and repeatedly says, "Fuck." When discussing a Christmas gift, Hornstra said a family member had to buy an "Xbox" for her boss, who was a "black guy," and Burton responded, "Damn." Burton and Lisa referred to the female detective handling the case as a "bitch." When Hornstra and Lisa referred to Gragson as a "scumbag," Burton agreed. Hornstra also described her as "skanky with her rotten teeth."

The trial court's admission of these profanity laced conversations where Burton, Hornstra, and Lisa demeaned and disparaged law enforcement and family, and made numerous crude remarks was highly prejudicial. The telephone conversations portrayed Burton as crude and unenlightened. And they suggested his family believed him to be guilty of killing Tiffany E. Particularly troubling is when Lisa said, "you can't have anything with a child" and any offer of a "deal" would take some time, and Burton replied, "Yeah, that (inaudible) didn't suffer."

When we consider the conflicts in the medical testimony with the extremely prejudicial nature of the telephone conversations, we conclude it is reasonably probable that had the trial court excluded the conversations, Burton would have received a better result. Although we conclude admission of the telephone conversations was sufficiently prejudicial by itself to require reversal, nonetheless we will address Burton's other contentions.

II. Other Errors

A. CALCRIM No. 361

Burton contends the trial court erroneously instructed the jury with CALCRIM No. 361 because there was insufficient evidence supporting the instruction. We agree the court erred but conclude this error alone did not prejudice Burton.

Before instructing the jury with CALCRIM No. 361, a trial court must determine the following: (1) if a question was asked that called for an explanation or denial of incriminating evidence; (2) if the defendant knew the facts necessary to answer the question or if some circumstance precluded the defendant from knowing such facts; and (3) if the defendant failed to deny or explain the incriminating evidence when answering the question. (*People v. Saddler* (1979) 24 Cal.3d 671, 682-683 (*Saddler*).)

After hearing argument from counsel, the trial court explained both Missy and Lisa said Tiffany E. had no bruises the morning of the incident. The paramedic also testified he examined her and found no visible injuries. The court added that when the prosecutor asked Burton whether he could explain how she suffered the injuries, he could not. The court concluded it was appropriate to instruct the jury with CALCRIM No. 361.

The trial court instructed the jury with CALCRIM No. 361 as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

It is true both Missy and Lisa testified Tiffany E. did not have any bruises on the morning of the incident and when the prosecutor asked Burton whether he had an explanation as to how Tiffany E. suffered her injuries, Burton responded, “I have no idea how that happened.” But when the prosecutor then asked whether he had any

explanation, Burton denied injuring Tiffany E. when he replied, “The marks did not come from me.”

We presume the trial court was concerned the jury would draw an impermissible inference from Burton’s initial failure to explain the bruises and felt the instruction would aid the jury in evaluating Burton’s answer and inform them of the applicable burden of proof. However, the foundational requirements for instructing the jury with CALCRIM No. 361 were not met. Although Burton first failed to explain how Tiffany E. suffered her bruises, he then denied inflicting them. Because Burton denied inflicting Tiffany E.’s injuries, it was error for the trial court to instruct the jury with CALCRIM No. 361. (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119-1120 [CALJIC No. 2.62, CALCRIM No. 361’s predecessor, considered a “disfavored instruction” and should not be given unless a specific and significant defense omission is shown].)

However, the giving of this instruction alone does not require reversal because the instruction protects a defendant by warning the jury a defendant’s failure to explain or deny evidence is insufficient by itself to prove guilt and the prosecutor has the burden of proving each element of the crime beyond a reasonable doubt. (*Saddler, supra*, 24 Cal.3d at pp. 679-680; *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066-1067 [CALCRIM No. 361 constitutional].)

B. Ineffective Assistance of Counsel

Burton contends his trial counsel was ineffective because he failed to object to admission of the juvenile court order prohibiting him from living with Tiffany E. He also contends his counsel was ineffective for failing to object to the prosecutor’s closing argument concerning the juvenile court order. We agree his defense counsel’s performance was deficient but conclude these errors alone did not prejudice Burton.

“In order to establish a violation of the right to effective assistance of counsel, a defendant must show that counsel’s performance was inadequate when

measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case in such a manner that his representation 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.] . . . Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41 (*Sanchez*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) "“[T]rial counsel's tactical decisions are accorded substantial deference [citations], [and] . . . [a] reviewing court will not second-guess trial counsel's reasonable tactical decisions.”” [Citation.]" (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

1. Admission of Evidence of Juvenile Court Order

As the Attorney General notes, most of the in limine motions were discussed in chambers and not reported. The clerk's and reporter's transcripts indicate the majority of the in limine motions were addressed on July 23, 2007. However, the only motions that were addressed on the record were admission of Burton's statements to officers at the hospital, and the jailhouse telephone conversations.

The Attorney General relies on Missy's testimony and a discussion on the record out of the presence of the jury to support its contention defense counsel objected to admission of the juvenile court order. After Missy testified Burton could not live with Tiffany E. because of his "drug history," there was a discussion out of the presence of the jury. Defense counsel moved for a mistrial because "it was agreed upon there would be no reference to drug use in reference to . . . Burton and/or any basis or direct relation to drug use in relation to the November 5[,], 2005[,], court order for him to stay out of the residence of . . . [Lisa]."

The Attorney General's reliance on this discussion is misplaced. At best, it demonstrates defense counsel objected to admission of any evidence concerning the *reason* for the juvenile court order. It does not prove defense counsel objected to admission of evidence of the *existence* of the juvenile court order. Therefore, we must address Burton's claim he received ineffective assistance of counsel. We conclude counsel's performance was deficient for failing to object to admission of the juvenile court order.

Although we defer to trial counsel's tactical decisions and will not second-guess them, here we can discern no possible tactical decision for failing to bring an in limine motion to exclude evidence of the juvenile court order prohibiting Burton from living with Tiffany E. Until Missy testified the basis for the order was Burton's drug history, there was no evidence as to why the court made such an order. Did Burton harm a child? Did he commit a sexual offense against a child? Was he a drug addict? The jury was free to speculate as to the reason for the order. And we cannot be sure the jury believed Missy's explanation for the order. Therefore, in a case such as this where Burton's credibility was crucial to his defense, we can see no possible tactical reason for failing to object to admission of the juvenile court order.

C. Prosecutorial Misconduct

Soon after he began his closing argument, the prosecutor stated: "What you have on November 30th of the year 2005 at 8:45 in the morning, is a healthy, happy, very content, beautiful three-month-old little girl. She's left in the home with the only person who's not allowed to be in the home. [Fifty] minutes later she is essentially dead." The prosecutor mentioned the juvenile court order thrice more during his closing argument.

First, the juvenile court order did not prohibit Burton being in his mother's home; it prevented him from living with Tiffany E. Therefore, the prosecutor mischaracterized the evidence and misled the jury. (*People v. Hill* (1998) 17 Cal.4th 800,

823 [mischaracterizing the evidence is misconduct].) We remind the prosecutor he is held to a higher standard of conduct because of his unique role in representing the state, and although he may strike hard blows, he may not strike foul ones. (*Berger v. United States* (1935) 295 U.S. 78, 88.) Because Burton concedes his defense counsel did not object to any of the alleged prosecutorial misconduct during cross-examination and closing argument, he forfeited appellate review of this issue. (*People v. Salcido* (2008) 44 Cal.4th 93, 152.)

Again, we discern no possible tactical decision for defense counsel failing to object to the prosecutor's statements on the grounds of prosecutorial misconduct. Defense counsel allowed the prosecutor to invite the jury to conclude Burton was a dangerous man who was not to be trusted with children. Defense counsel's performance was deficient for failing to object to the prosecutor's statements on grounds of prosecutorial misconduct.

The issue now is whether it was reasonably probable that but for defense counsel's errors alone the result of the proceeding would have been different. We conclude that based solely on defense counsel's performance it is not reasonably probable the result would have been different. The trial court instructed the jury that it must determine what are the facts of the case, and nothing the attorneys say is evidence (CALCRIM No. 104). We presume jurors are intelligent people capable of understanding the instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

D. Disclosure of Juror Information

Burton argues the trial court erroneously denied his motion to disclose confidential juror identifying information to investigate possible juror misconduct. We agree the court erred in denying the petition because Burton made a prima facie showing of good cause warranting a hearing to determine whether there was juror misconduct.

“[Civil Procedure] [s]ection 237, subdivision (b), provides: ‘Any person may petition the court for access to [confidential juror information]. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror’s personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.’” (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1320.)

The jury reached its verdict on August 7, 2007. Three months later, the San Bernardino County Public Defender’s office substituted in as Burton’s defense counsel. Over two months later, new defense counsel met with Joy Vaughn, a courtroom observer for the entire trial, who expressed to counsel concerns she had because of conversations she overheard in the ladies’ restroom during trial. Defense counsel filed a petition seeking the disclosure of confidential juror identifying information in anticipation of filing a new trial motion based on juror misconduct.

Attached to the petition was a declaration from Vaughn stating, in relevant part, the following: “On August 1, 2007, when the court took its morning break for lunch, I went to the ladies room, down the hallway from the court room. While in there, I overheard two of the jurors commenting about the case. The [first] juror said, ‘I can’t stand to hear them talk anymore. It is the same thing over and over again.’ To this, the [second] juror responded, ‘I know. I don’t need to hear anymore. I already know.’ The [first] juror then said, ‘Yea[h]. I know what you mean.’” On another occasion just

before closing argument, she heard the same two jurors talking. One juror said, “I can’t stand seeing those people anymore.” The second juror replied, “I know. Total white trash.” The prosecutor opposed the petition but did not include supporting affidavits.

At a hearing on the petition, the trial court indicated there was a lengthy chambers discussion concerning the motion. The court after citing to the authority it relied on in making its decision stated: “I have carefully reviewed the motion by the defendant, the prosecution’s response, thereof, the declaration of . . . Vaughn, and all of the surrounding circumstances regarding the trial, and the timing of these particular issues. And it is the [c]ourt’s belief based on due reflection that the defendant has not set forth a sufficient good cause showing to support a reasonable belief that jury misconduct has occurred. So the petition is respectfully denied.”

Although the affidavit was submitted well after the trial, and Vaughn may have been Burton’s friend, Vaughn’s affidavit was sufficient evidence to warrant a hearing on the issue of juror misconduct. Before and during trial, the trial court repeatedly instructed the jury not to discuss the case with each other until deliberations begin, and to keep an open mind throughout the trial. The jurors violated the trial court’s order by discussing the case, and one of the jurors stated she made up her mind before hearing all the evidence. One of the jurors referred to Burton and his family as “white trash,” indicating the jury had prejudged Burton. And the prosecutor did not offer any admissible evidence to support its arguments. Thus, Burton made a prima facie showing of good cause warranting a hearing to determine whether there was juror misconduct, and therefore, the trial court erroneously denied Burton’s petition to release confidential juror identifying information.

III. Cumulative Error

Burton argues the cumulative effect of the errors violated his due process rights. Needless to say, if admission of the telephone calls alone was so prejudicial as to require reversal, the combined effect of the errors only made matters worse.

In *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 925 (*Parle*), a California Court of Appeal concluded there were serious evidentiary errors but held those errors were harmless. In a petition for writ of habeas corpus, the Ninth Circuit Court of Appeals held that the “cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. [Citation.]” (*Id.* at p. 927.) The court stated that all of the improperly excluded evidence in petitioner’s case supported his defense he lacked the requisite state of mind for first degree murder, and, at the same time, all of the erroneously admitted evidence (which included that of petitioner’s prior violent threats to a police officer) undermined his defense and credibility and bolstered the prosecutor’s case. (*Id.* at p. 930.) The court explained the test of whether the combined effect of evidentiary errors violated a defendant’s due process rights is whether the errors made the defense “‘far less persuasive’ [citation]” and thereby had a “‘substantial and injurious effect’ on the jury’s verdict [citation].” (*Id.* at p. 928.)

As we explain above in greater detail, admission of the telephone conversations alone requires reversal because the conversations portray him and his family unfavorably, and his family’s statements suggest they believed he was guilty. Although we have concluded the giving of CALCRIM No. 361 alone does not require reversal, the giving of the instruction compounded the error by informing the jury Burton had failed to explain how Tiffany E. suffered her bruises, thus impugning his credibility because she was in his care and when Missy and Lisa left, she was apparently uninjured. Finally, admission of the juvenile court order prohibiting Burton from living with Tiffany E. further compounded the error because the jury was free to speculate as to the basis of the order, and could have concluded he had a propensity for violent behavior. At the very beginning of his closing argument, the prosecutor referred to the juvenile court order and invited the jury to infer Burton was not to be in his mother’s home with Tiffany E. because he was a violent person.

These errors made Burton's defense far less persuasive because they permitted the jury to believe Burton was a violent, unsavory person who could not explain how the child he was illegally caring for suffered her physical injuries, and whose equally unpleasant family believed him to be guilty. At oral argument, the Attorney General conceded that if the jury believed Gabriel's testimony it would have created a reasonable doubt. Based on the weakly supported record, we conclude the multiple errors had a substantial and injurious effect on the jury's verdict such that it has undermined our confidence in the outcome. (*Parle, supra*, 505 F.3d at p. 925.)

DISPOSITION

The judgment is reversed.

O'LEARY, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.